

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANDREW H.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C18-5967 TLF

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of his applications for disability insurance and supplemental security income benefits. The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13. This case is before the Court for the second time. On May 29, 2013, Administrative Law Judge ("ALJ") David Johnson issued a decision finding plaintiff not disabled. See AR 19–32. Plaintiff sought review in this Court, and U.S. Magistrate Judge Mary Alice Theiler reversed the ALJ's decision. See AR 1046–66. Judge Theiler did not rule in plaintiff's favor on all issues, so plaintiff sought review in the Ninth Circuit. See AR 1078. The Ninth Circuit affirmed Judge Theiler's decision.¹ See AR 757.

¹ The Ninth Circuit's decision is absent from the record, but is available at *Andrew H. v. Berryhill*, 693 F. App'x 602 (9th Cir. 2017). Plaintiff's name is redacted to remain consistent with the Court's practice in social security cases.

1 In November 2013, while plaintiff's appeal was pending, he filed new applications
 2 for disability benefits. See AR 1638–45. ALJ Gary Elliott denied those new claims,
 3 issuing a decision in which he found plaintiff not disabled. See AR 1375–88. The
 4 Appeals Council vacated that decision, however, and remanded plaintiff's claims to the
 5 ALJ. See AR 1391–93.

6 On remand, these claims were consolidated, and ALJ Andrew Grace issued new
 7 a decision, dated July 27, 2018. See AR 757–82. ALJ Grace again found plaintiff not
 8 disabled. See *id.* Plaintiff seeks review of this latest decision.²

9 10 I. ISSUES FOR REVIEW

- 11 A. Did the ALJ harmfully err in discounting plaintiff's symptom testimony?
- 12 B. Did the ALJ harmfully err in evaluating the medical evidence?
- 13 C. Did the ALJ harmfully err in discounting lay witness statements?
- 14 D. Did the ALJ harmfully err in assessing plaintiff's residual functional
 15 capacity ("RFC") and by basing his step five finding on that RFC?

16 17 II. DISCUSSION

18 The Court will uphold an ALJ's decision unless: (1) the decision is based on legal
 19 error, or (2) the decision is not supported by substantial evidence. *Ford v. Saul*, 950
 20 F.3d 1141, 1154, 1159 (9th Cir. 2020). Substantial evidence is "such relevant evidence

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 22 ² In his opening brief, plaintiff states that he filed prior applications, and that ALJ
 23 Johnson declined to reopen those applications. See Pl. Op. Br. (Dkt. # 18) at 2 n.1.
 24 Plaintiff suggests, but does not affirmatively argue, that this decision not to reopen his
 25 prior applications was erroneous. See *id.* The Court therefore does not consider the
 issue. *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008).

1 as a reasonable mind might accept as adequate to support a conclusion.” *Biestek v.*
2 *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S.
3 197, 229 (1938)).

4 This requires “more than a mere scintilla,” of evidence. *Id.* The Court must
5 consider the administrative record as a whole. *Garrison v. Colvin*, 759 F.3d 995, 1009
6 (9th Cir. 2014). It must weigh both the evidence that supports, and evidence that does
7 not support, the ALJ’s conclusion. *Id.*

8 The Court considers in its review only the reasons the ALJ identified and may not
9 affirm for a different reason. *Id.* at 1010. Furthermore, “[l]ong-standing principles of
10 administrative law require us to review the ALJ’s decision based on the reasoning and
11 actual findings offered by the ALJ—not post hoc rationalizations that attempt to intuit
12 what the adjudicator may have been thinking.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554
13 F.3d 1219, 1225–26 (9th Cir. 2009) (citations omitted).

14 **A. The ALJ Did Not Harmfully Err in Discounting Plaintiff’s Testimony**

15 In weighing a plaintiff’s testimony, an ALJ must use a two-step process. *Trevizo*
16 *v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). First, the ALJ must determine whether
17 there is objective medical evidence of an underlying impairment that could reasonably
18 be expected to produce some degree of the alleged symptoms. *Ghanim v. Colvin*, 763
19 F.3d 1154, 1163 (9th Cir. 2014). If the first step is satisfied, and provided there is no
20 evidence of malingering, the second step allows the ALJ to reject the claimant’s
21 testimony of the severity of symptoms if the ALJ can provide specific findings and clear
22 and convincing reasons for rejecting the claimant’s testimony. *Id.*

1 Plaintiff testified he suffers from low back pain radiating down his left leg, right
2 shoulder range of motion limitations, concentration and memory problems, and
3 depression. See AR 48–71, 947–58, 971–82, 1002–13. Plaintiff testified he cannot sit,
4 stand, or walk for more than 15–20 minutes at a time. See AR 67–68, 949, 951, 971.
5 Plaintiff testified he cannot lift his right arm above shoulder height, and sometimes has
6 tremors in his right hand due to his shoulder pain. See AR 69–71, 948, 975–76. He
7 testified he has difficulty concentrating and remembering things. See AR 57, 947, 982,
8 1006, 1010. He testified he has trouble getting along with supervisors, and panics in
9 groups of more than six people. See AR 957–58, 982, 1002.

10 Judge Theiler affirmed ALJ Johnson’s rejection of plaintiff’s 2013 symptom
11 testimony. See AR 1062–64. Plaintiff has since testified at three additional hearings.
12 See AR 941–1016. Judge Theiler’s decision does not preclude plaintiff from challenging
13 ALJ Grace’s rejection of this later symptom testimony, although it is relevant to the
14 validity of ALJ Grace’s reasoning.

15 The ALJ found plaintiff’s medically determinable impairments could cause the
16 symptoms he alleged. See AR 765. But the ALJ found plaintiff’s statements regarding
17 the severity of his symptoms were not fully consistent with the medical and other
18 evidence in the record. See AR 765–66.

19 1. The ALJ Did Not Harmfully Err in Rejecting Plaintiff’s Physical Symptom
20 Testimony

21 The ALJ rejected plaintiff’s testimony regarding the severity of his physical
22 symptoms because it was inconsistent with the medical evidence, which showed mostly
23 mild symptoms and conservative treatment, plaintiff appeared to exaggerate his
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1 symptoms, and plaintiff's testimony was inconsistent with his activities of daily living.
2 See AR 766–67, 769.

3 The ALJ did not err in rejecting plaintiff's testimony as inconsistent with the
4 medical evidence. An ALJ may reject a claimant's symptom testimony when it is
5 contradicted by the medical evidence. See *Carmickle*, 533 F.3d at 1161 (citing *Johnson*
6 *v. Shalala*, 60 F.3d 1428, 1434 (9th Cir.1995)); see also *Parra v. Astrue*, 481 F.3d 742,
7 750–51 (9th Cir. 2007) ("We have previously indicated that evidence of 'conservative
8 treatment' is sufficient to discount a claimant's testimony regarding the severity of an
9 impairment." (quoting *Johnson*, 60 F.3d at 1434)). ALJ Grace found plaintiff's
10 complaints were inconsistent with the medical records, which showed mostly mild
11 symptoms and conservative treatment. See AR 766–67, 69. ALJ Grace's findings
12 largely matched ALJ Johnson's earlier findings, but with more detail. See AR 25–26,
13 766–67.

14 Judge Theiler affirmed ALJ Johnson's analysis, as did the Ninth Circuit. See AR
15 1063; *Andrew H. v. Berryhill*, 693 F. App'x at 603. Plaintiff has not identified anything in
16 the medical records submitted since ALJ Johnson's decision that would render this
17 continued finding irrational. Plaintiff has thus failed to show ALJ Grace harmfully erred.
18 See *Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012) (citing *Shinseki v. Sanders*,
19 556 U.S. 396, 407–09 (2009)) (holding the party challenging an administrative decision
20 bears the burden of proving harmful error).

21 Plaintiff has similarly failed to show ALJ Grace harmfully erred in rejecting
22 plaintiff's testimony based on his exaggeration of symptoms and having a disability
23 mindset. ALJ Grace's analysis on this issue was again the same as ALJ Johnson's
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1 analysis. See AR 25, 766–67. Judge Theiler upheld ALJ Johnson’s analysis, and the
2 Ninth Circuit affirmed. See AR 1063; *Andrew H. v. Berryhill*, 693 F. App’x at 603.
3 Plaintiff has not identified any evidence in the newer records that undermines this
4 finding, and has thus failed to show harmful error. See *Ludwig*, 681 F.3d at 1054 (citing
5 *Shinseki*, 556 U.S. at 407–09).

6 The Court need not address ALJ Grace’s rejection of plaintiff’s physical symptom
7 testimony as inconsistent with his general activity level because any error in that
8 analysis was harmless. “[A]n error is harmless so long as there remains substantial
9 evidence supporting the ALJ’s decision and the error ‘does not negate the validity of the
10 ALJ’s ultimate conclusion.’” See *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
11 (quoting *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004)).
12 Whether plaintiff’s general activity level contradicted his testimony, for example, does
13 not invalidate ALJ Grace’s conclusion that plaintiff’s level of treatment contradicted his
14 testimony. The ALJ therefore did not harmfully err in rejecting plaintiff’s physical
15 symptom testimony.

16 2. The ALJ Did Not Harmfully Err in Rejecting Plaintiff’s Mental Symptom
17 Testimony

18 The ALJ rejected plaintiff’s testimony regarding the severity of his mental
19 symptoms because it was inconsistent with the medical evidence and plaintiff’s activities
20 of daily living. See AR 767–71.

21 The ALJ did not harmfully err in rejecting plaintiff’s mental symptom testimony as
22 inconsistent with the medical evidence. Plaintiff sought at least some level of therapy in
23 2014, and attended therapy on an almost weekly basis from June 2016 through May
24 2018. See AR 1280–1309, 1926–30, 1982–2020, 2046–76. The ALJ did not accurately
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1 portray the extent of plaintiff's treatment in his analysis, suggesting that plaintiff received
2 little to no treatment for much of the alleged disability period. See AR 768–69. The ALJ
3 may not reject a plaintiff's testimony based on an inaccurate portrayal of the record. See
4 *Reddick v. Chater*, 157 F.3d 715, 722–23 (9th Cir. 1998) (reversing ALJ's decision
5 where his "paraphrasing of record material is not entirely accurate regarding the content
6 or tone of the record").

7 This error was nonetheless harmless because the ALJ reasonably found
8 Plaintiff's symptoms were controlled with medication. "Impairments that can be
9 controlled effectively with medication are not disabling for the purpose of determining
10 [social security disability] benefits." *Warre ex rel. E.T. IV v. Comm'r of Soc. Sec. Admin.*,
11 439 F.3d 1001, 1006 (9th Cir. 2006). The ALJ reasonably concluded from medical
12 records that plaintiff's symptoms were stable and controlled when he was taking
13 medications. See AR 769–70 1794, 1888, 1899, 1963–64, 2129. Plaintiff fails to show
14 that the ALJ's decision was legally erroneous or based on less than a scintilla of
15 evidence; plaintiff thus fails to show harmful error. *Ford*, 950 F.3d at 1154, 1159.

16 The ALJ similarly did not err in rejecting plaintiff's mental symptom testimony as
17 inconsistent with his activities of daily living. An ALJ may reject a plaintiff's symptom
18 testimony based on his daily activities if they contradict his testimony or "meet the
19 threshold for transferable work skills." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007)
20 (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). The ALJ reasonably noted
21 plaintiff completed an associate's degree, which demonstrated a level of intellectual
22 capacity beyond plaintiff's claims even though it took him twice as long to complete the
23 degree as is typical. See AR 767. The ALJ also reasonably noted plaintiff was able to
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1 travel to Wisconsin and attend garage sales despite claims of overwhelming social
2 anxiety. See AR 769–70.

3 The ALJ’s decision to reject plaintiff’s mental symptom testimony is not free from
4 error, but plaintiff has failed to show any harmful error. The ALJ gave at least two valid
5 reasons for rejecting plaintiff’s mental symptom testimony, and those reasons remain
6 valid despite the ALJ’s errors. The ALJ therefore did not harmfully err in rejecting
7 plaintiff’s mental symptom testimony. See *Molina*, 674 F.3d at 1115.

8 **B. The ALJ Partially Erred in Evaluating the Medical Evidence**

9 Many of plaintiff’s arguments about the medical evidence amount to a mere
10 disagreement with how the ALJ weighed the medical information and opinions from
11 various sources. Disagreement is not the standard of review – legal error, or lack of
12 substantial evidence, would be the only basis upon which this Court may find error.

13 1. Judy Miller, ARNP

14 Ms. Miller completed evaluations of plaintiff in January, June, and July 2010. See
15 AR 633–38, 640–46, 648–50. In January 2010, Ms. Miller opined plaintiff could perform
16 light work, and had limitations in his ability to balance, bend, climb, crouch, pull, push,
17 and stoop. See AR 635. She noted plaintiff saw himself as disabled, and showed signs
18 of exaggeration. See AR 636–37. In June 2010, Ms. Miller opined plaintiff could perform
19 sedentary work, with standing, sitting, and lifting restrictions. See AR 640, 644. She
20 opined plaintiff was “overstating and overplaying his symptoms.” AR 646. In July 2010,
21 Ms. Miller opined plaintiff had standing, sitting, and lifting restrictions. See AR 648. She
22 reported plaintiff’s MRI results were not consistent with plaintiff’s report of pain or exam
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1 findings, as the MRI indicated a much milder disease than his complaints would
2 support. AR 649.

3 ALJ Johnson gave Ms. Miller's opinions some weight. See AR 29. He gave
4 significant weight to her assessments that plaintiff was exaggerating his symptoms, but
5 little weight to her opinions regarding plaintiff's functional abilities. See *id.* Judge Theiler
6 upheld ALJ Johnson's evaluation of Ms. Miller's opinions, finding plaintiff failed to
7 articulate any specific limitations ALJ Johnson failed to include in the RFC. See AR
8 1058. The Ninth Circuit affirmed. See *Andrew H. v. Berryhill*, 693 F. App'x at 603.

9 ALJ Grace's decision is the same as ALJ Johnson's analysis; ALJ Grace added
10 that Ms. Miller's opinions were too heavily reliant on plaintiff's self-reports. See AR 771–
11 72. Plaintiff argues this analysis was not supported by substantial evidence. But plaintiff
12 fails to articulate why the Court should revisit a decision two courts have already upheld.
13 Plaintiff has thus failed to show the ALJ harmfully erred in evaluating Ms. Miller's
14 opinions. See *Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012) (citing *Shinseki v.*
15 *Sanders*, 556 U.S. 396, 407–09 (2009)) (holding the party challenging an administrative
16 decision bears the burden of proving harmful error).

17 2. Gary Gaffield, D.O.

18 Dr. Gaffield evaluated plaintiff in May 2011. See AR 661–66. He opined plaintiff
19 could lift 20 pounds occasionally and 10 pounds frequently. AR 666. Dr. Gaffield opined
20 plaintiff could perform postural activities occasionally, had no manipulative limitations,
21 and should avoid heights and heavy equipment. *Id.*

22 ALJ Grace gave Dr. Gaffield's opinions significant weight, just as ALJ Johnson
23 had previously done. See AR 27, 772.

1 Plaintiff contends ALJ Grace erred in evaluating the opinions of Dr. Gaffield,
2 stating that ALJ Grace “fails to discuss many of Dr. Gaffield’s clinical findings, nor does
3 he acknowledge that many of these findings are consistent with Dr. [Mark] Heilbrunn,
4 Ph. D.]’s opinion.” Pl. Op. Br. at 5. Plaintiff has asserted neither legal error, nor lack of
5 substantial evidence – thus plaintiff fails to show the ALJ harmfully erred in evaluating
6 Dr. Gaffield’s opinions. *Ford*, 950 F.3d at 1154, 1159.

7 3. Mark Heilbrunn, M.D.

8 Dr. Heilbrunn examined plaintiff in January 2013. See AR 718–24. Dr. Heilbrunn
9 opined plaintiff had exertional, postural, and reaching limitations. See AR 723–24.

10 ALJ Grace gave Dr. Heilbrunn’s opinions limited weight, giving the same reasons
11 as ALJ Johnson had in his decision. See AR 29, 772–73. Each of the ALJs found that
12 Dr. Heilbrunn inaccurately characterized MRI results he reviewed – which showed mild
13 findings. Dr. Heilbrunn did not have the benefit of reviewing Ms. Miller’s documented
14 concerns about plaintiff’s exaggeration of his symptoms; and he relied too heavily on
15 plaintiff’s self-reports without the benefit of knowing about plaintiff’s school and other
16 activities. See AR 29, 773. Judge Theiler upheld the first ALJ’s analysis, and the Ninth
17 Circuit affirmed. See AR 1050–54; *Andrew H. v. Berryhill*, 693 F. App’x at 603.

18 “Where the evidence is susceptible to more than one rational interpretation, one
19 of which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.” *Thomas v.*
20 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citing *Morgan v. Comm’r of Soc. Sec.*
21 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999)). Although some of Dr. Heilbrunn’s findings
22 may support his opinions, that does not establish that the ALJ erred in discounting those
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1 opinions based on other contradictions in the record. Plaintiff has thus failed to show the
2 ALJ harmfully erred in rejecting Dr. Heilbrunn's opinions.

3 4. Lawrence Conover, PAC, and Bonnie McReynolds, ARNP

4 Mr. Conover evaluated plaintiff in October 2013. See AR 1826–31. ARNP
5 McReynolds evaluated plaintiff in August 2015. See AR 1936–38. Both providers opined
6 plaintiff could perform sedentary work. See AR 1828, 1938.

7 The ALJ gave these evaluators' opinions significant weight. AR 773. Plaintiff
8 argues the ALJ erred in doing so because he "fail[ed] to acknowledge that these
9 clinicians provided little explanation for their opinions," and incorrectly interpreted the
10 evidence. Pl. Op. Br. at 9.

11 Plaintiff has failed to show harmful error. See *Ludwig*, 681 F.3d at 1054 (citing
12 *Shinseki*, 556 U.S. at 407–09). Plaintiff has not shown the ALJ's determination
13 regarding these two medical providers was based on less than substantial evidence,
14 and points to nothing in the record that would suggest legal error (except for the
15 confusion regarding Dr. Packer's opinion as it relates to Ms. McReynold's opinion, as
16 described in the next section).

17 5. Brent Packer, M.D.

18 The ALJ erred in his evaluation of Dr. Packer's opinions. There is no explanation
19 of why the ALJ rejected Dr. Packer's less-than-sedentary opinion, other than briefly
20 stating it was not probative because it only relied on Ms. McReynolds's findings. The
21 ALJ accepted Ms. McReynolds's opinions – therefore, an explanation is necessary as to
22 why he was rejecting Dr. Packer's opinions for relying on the same findings as Ms.
23 McReynolds.

1 Dr. Packer stated he reviewed a medical report from John Rodakowski, M.D.,
2 which appears to have been Ms. McReynolds's report. See AR 797–99. Dr. Packer
3 opined plaintiff had back issues that limited him to less than sedentary work, and were
4 of such severity that he met listing 1.04A. See AR 797. Dr. Packer's report noted on the
5 following page, however, that plaintiff was able to perform sedentary work. See AR 798.

6 The ALJ gave Dr. Packer's opinion that plaintiff was capable of performing
7 sedentary work significant weight yet rejected his opinions that plaintiff could only
8 perform less than sedentary work and met a listing. See AR 774. The ALJ rejected Dr.
9 Packer's less-than-sedentary opinion because it was inconsistent with his sedentary
10 opinion. See AR 773–74. The ALJ rejected Dr. Packer's listing opinion as insufficiently
11 supported by the evidence. See AR 762, 774. The ALJ also noted Dr. Packer's
12 "evaluation contains little in the way of probative evidence, as he simply reviewed
13 records by [Mr. Conover], whom [plaintiff] saw only the one time in October 2013." AR
14 774.

15 Because this portion of the ALJ's opinion is not supported by substantial
16 evidence, and the error is not harmless, the Court reverses and remands for further
17 proceedings.

18 6. Alfred Scottolini, M.D., Norman Staley, M.D., and Dennis Koukol, M.D.

19 Dr. Scottolini reviewed records regarding plaintiff's claims in May 2011 as part of
20 the Social Security Administration's ("SSA") initial evaluation of plaintiff's claims. See
21 AR 87–99. He opined plaintiff had exertional and postural limitations. See AR 96–97.
22 Dr. Staley reviewed records in September 2011 as part of the SSA's reconsideration of
23 plaintiff's claims. See AR 115–29. Dr. Staley opined plaintiff had exertional and postural
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1 limitations. See AR 125–26. Dr. Koukol reviewed records as part of the SSA’s
2 reconsideration of plaintiff’s 2013 applications. See AR 1354–64. Dr. Koukol’s opinions
3 were similar to those of Dr. Scottolini and Dr. Staley. See AR 1360–62.

4 The ALJ gave these doctors’ opinions significant weight. AR 774. Plaintiff argues
5 the ALJ should have given more weight to the opinions of Ms. Miller and Dr. Heilbrunn.
6 As explained above, the ALJ did not harmfully err in discounting Ms. Miller’s and Dr.
7 Heilbrunn’s opinions, and plaintiff’s assertion that the ALJ should have weighed
8 opinions differently, without analysis as to why the weight given was irrational, does not
9 establish that the ALJ erred. Plaintiff has thus failed to show harmful error.

10 7. Tasmyn Bowes, Psy.D.

11 Dr. Bowes evaluated plaintiff in November 2009 and September 2010. See AR
12 613–31, 1842–59. Dr. Bowes opined plaintiff had mild or moderate limitations in various
13 areas of cognitive and social functioning. See AR 619, 1847. Among other things, Dr.
14 Bowes opined plaintiff had moderate limitations in his ability to interact appropriately
15 with coworkers and supervisors. *Id.* She explained plaintiff “tends to be pessimistic and
16 have a difficult time maintaining relationships.” *Id.*

17 The ALJ gave significant weight to Dr. Bowes’s opinions that plaintiff had mild
18 limitations in several areas, but little weight to Dr. Bowes’s opinion that plaintiff was
19 moderately limited in his ability to relate appropriately to coworkers and supervisors.
20 See AR 775. The ALJ still included in the RFC a limitation to occasional contact with the
21 public and coworkers, but did not include any limitations regarding contact with
22 supervisors. See AR 764.

1 The ALJ erred in his rejection of Dr. Bowes's opinion regarding plaintiff's ability to
2 relate to supervisors. The ALJ gave no explanation for why he gave this opinion little
3 weight. "[A]n ALJ errs when he rejects a medical opinion or assigns it little weight while
4 doing nothing more than ignoring it, asserting without explanation that another medical
5 opinion is more persuasive, or criticizing it with boilerplate language that fails to offer a
6 substantive basis for his conclusion." *Garrison*, 759 F.3d at 1012–13 (citing *Nguyen v.*
7 *Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996)). The decision is reversed and remanded
8 because the ALJ harmfully erred in rejecting Dr. Bowes's opinion regarding plaintiff's
9 ability to relate to supervisors.

10 8. Melinda Losee, Ph.D.

11 Dr. Losee evaluated plaintiff in May 2011. See AR 669–73. Dr. Losee opined
12 plaintiff's depression was mild, and his daily functioning was not significantly impaired
13 by it. See AR 671. Dr. Losee opined plaintiff could understand, remember, and carry out
14 instructions on a sustained basis, respond appropriately to supervision, coworkers, and
15 the general public, and deal with normal work pressure and changes in routine. See AR
16 672.

17 The ALJ gave Dr. Losee's opinions significant weight. AR 776. Plaintiff fails to
18 show harmful error; substantial evidence supports this decision plaintiff fails to show the
19 ALJ's interpretation of the evidence was error, even if an alternate interpretation could
20 be supported. See *Thomas*, 278 F.3d at 954 (citing *Morgan*, 169 F.3d at 599).

21 9. Keith Krueger, Ph.D.

22 Dr. Krueger evaluated plaintiff on three occasions. See AR 725–29, 1814–25,
23 1832–41. Dr. Krueger opined plaintiff had marked limitations in his ability to adapt to
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1 changes, communicate and perform effectively in a work setting, maintain appropriate
2 behavior in a work setting, maintain a work schedule, and complete a normal work day
3 or week without interruptions from his psychologically based symptoms. See AR 728–
4 29, 1816, 1834.

5 The ALJ gave Dr. Krueger’s opinions regarding marked limitations very little
6 weight. See AR 776–78. The ALJ reasoned these opinions were inconsistent with the
7 medical and other evidence in the record. See *id.*

8 Plaintiff fails to show harmful error. Plaintiff asserts reasons why the ALJ should
9 have accepted Dr. Krueger’s opinions, but does not present a substantive argument
10 showing why the ALJ’s reasons were based on less than substantial evidence, nor does
11 plaintiff show the reasons were legally erroneous. Plaintiff has thus failed to show the
12 ALJ harmfully erred in weighing Dr. Krueger’s opinions. See *Thomas*, 278 F.3d at 954.

13 10. Kimberly Wheeler, Ph.D.

14 Dr. Wheeler evaluated plaintiff in September 2015. See AR 1931–35. She opined
15 plaintiff had marked limitations in his ability to adapt to changes in a routine work
16 setting, communicate and perform effectively in a work setting, and complete a normal
17 work day or week without interruptions from his psychologically based symptoms. AR
18 1933.

19 The ALJ stated he was giving Dr. Wheeler’s opinions “great weight.” AR 778–79.
20 Yet the ALJ did not account for those opinions in the RFC. The ALJ limited plaintiff to
21 repetitive work with few changes, and occasional contact with the public and coworkers.
22 See AR 763–64. At a minimum, that does not account for Dr. Wheeler’s opinion that
23 plaintiff is markedly limited in his ability to complete a normal work day or week without
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1 interruptions. This decision must be reversed and remanded, because the ALJ gave no
2 reasons for failing to account for this opinion in the RFC, and thus harmfully erred. See
3 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1040–41 (9th Cir. 2007) (holding that ALJ's RFC
4 assessment and step five determination were not supported by substantial evidence
5 where the ALJ's RFC and hypotheticals to vocational expert failed to include all the
6 claimant's impairments).

7 11. Jaime Foland, M.D.

8 Dr. Foland saw plaintiff for chronic low back pain in February 2014. AR 1894–96.
9 Although Dr. Foland made several findings, no opinion was given as to any functional
10 restrictions. *See id.*

11 Plaintiff argues the ALJ erred because he “failed to acknowledge that these
12 findings support [Plaintiff]’s testimony about his symptoms and limitations.” Pl. Op. Br. at
13 15. As discussed above, the ALJ reasonably rejected plaintiff’s testimony. *See supra*
14 Part II.A. Substantial evidence supports the ALJ’s decision on plaintiff’s testimony, and
15 the plaintiff has not shown legal error. Plaintiff’s factual argument about how Dr.
16 Foland’s findings can be interpreted to potentially support plaintiff’s testimony does not
17 show the ALJ erred in rejecting plaintiff’s testimony.

18 12. Brian Palen, M.D.

19 Dr. Palen evaluated plaintiff for sleep issues in April 2018. *See* AR 1314–16. He
20 assessed plaintiff with moderate obstructive sleep apnea and recommended treatment.
21 *See* AR 1316.

22 Plaintiff argues the ALJ erred by finding plaintiff did not have a severe impairment
23 based on the conclusion he had received no prescribed treatment for it. Pl. Op. Br. at
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1 15. But an error in failing to find a particular impairment severe is harmless where the
2 ALJ continues his analysis, and includes in the RFC all limitations established by the
3 evidence, whether from severe or non-severe impairments. *See Buck v. Berryhill*, 869
4 F.3d 1040, 1049 (9th Cir. 2017). Plaintiff has not identified any functional limitations to
5 which Dr. Palen opined that were not included in the RFC; plaintiff has thus failed to
6 show harmful error.

7 **C. The ALJ Did Not Harmfully Err in Discounting Lay Witness Statements**

8 Lay testimony regarding a claimant's symptoms "is competent evidence that an
9 ALJ must take into account," unless the ALJ "expressly determines to disregard such
10 testimony and gives reasons germane to each witness for doing so." *Lewis v. Apfel*, 236
11 F.3d 503, 511 (9th Cir. 2001). In rejecting lay testimony, the ALJ need not cite the
12 specific record as long as "arguably germane reasons" for dismissing the testimony are
13 noted, even though the ALJ does "not clearly link his determination to those reasons,"
14 and substantial evidence supports the ALJ's decision. *Id.* at 512. The ALJ also may
15 "draw inferences logically flowing from the evidence." *Sample v. Schweiker*, 694 F.2d
16 639, 642 (9th Cir. 1982).

17 1. Plaintiff's Daughter

18 Plaintiff's daughter submitted a lay witness statement in 2013. *See* AR 334–38.
19 She reported plaintiff could not sit for more than about 20 minutes without needing to
20 stand. AR 334. Plaintiff's daughter reported plaintiff had pain in his back and hands,
21 which impacted his ability to sit, stand, walk, and engage in physical activity. *See* AR
22 335–36. She reported she had not seen plaintiff have problems with family and friends,
23 but he did not like crowds. *See* AR 336. She reported plaintiff did not like change, but
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1 she had “never witnessed him responding inappropriately to change.” AR 337.

2 ALJ Grace discounted plaintiff’s daughter’s statements, applying reasoning
3 similar to that of ALJ Johnson. See AR 30, 779. Both ALJs found plaintiff’s daughter’s
4 statements were insufficiently supported by the evidence, inconsistent with the medical
5 evidence, and inconsistent with plaintiff’s activity level. See *id.* Judge Theiler upheld ALJ
6 Johnson’s analysis, and the Ninth Circuit affirmed. See AR 1064–65; *Andrew H. v.*
7 *Berryhill*, 693 F. App’x at 603.

8 Plaintiff has not pointed to any new evidence that would call into question the
9 reasoning of ALJ Johnson’s, Judge Theiler’s, or the Ninth Circuit’s decisions. Plaintiff
10 has thus failed to show harmful error. *Ludwig*, 681 F.3d at 1054 (citing *Shinseki*, 556
11 U.S. at 407–09).

12 2. Interviewer D. Benton³

13 On November 13, 2013, D. Benton interviewed plaintiff as part of his 2013
14 disability benefits application. See AR 1688–90. D. Benton observed plaintiff “was
15 unable to sit for most of [the] interview as his back and shoulder were hurting him. No
16 other limitations [were] observed.” See AR 1689.

17 The ALJ did not address this observation. See AR 779–80. Plaintiff has
18 nonetheless failed to show harmful error. See *Ludwig*, 681 F.3d at 1054 (citing *Shinseki*,
19 556 U.S. at 407–09). First, D. Benton’s observations do not establish any specific
20 limitations beyond those already included in the RFC. See AR 763–64. The ALJ “need
21 not discuss *all* evidence presented to [him]. Rather, [he] must explain why ‘significant
22

23 ³ The record does not include interviewer D. Benton’s first name or gender. The Court
24 therefore refers to this individual as “D. Benton.”

1 probative evidence has been rejected.” *Vincent ex rel. Vincent v. Heckler*, 739 F.2d
 2 1393. 1394–95 (9th Cir. 1984) (quoting *Cotter v. Harris*, 642 F.2d 700. 706 (3d Cir.
 3 1981)).

4 Second, any error in failing to address D. Benton’s observations was harmless.
 5 D. Benton’s observations do not describe any limitations beyond those plaintiff
 6 described. See AR 67–71, 948–49, 951, 971, 975–76, 1689. The ALJ reasonably
 7 rejected plaintiff’s testimony, and those reasons could apply equally to D. Benton’s
 8 observations. See *supra* Part II.A.1. The ALJ therefore did not harmfully err in failing to
 9 address D. Benton’s observations. See *Molina*, 674 F.3d at 1122.

10 **D. The ALJ Harmfully Erred in Assessing Plaintiff’s RFC**

11 Plaintiff argues the ALJ erred in assessing plaintiff’s RFC, and by basing his step
 12 five findings on that RFC assessment. Pl. Op. Br. at 19. This argument is derivative of
 13 plaintiff’s other arguments, as it is based on the contention the ALJ failed to properly
 14 evaluate plaintiff’s symptom testimony, the medical evidence, and the lay witness
 15 testimony. See *id.* Because the Court has found the ALJ erred in his assessment of
 16 the opinions of Dr. Packer, Dr. Bowes, and Dr. Wheeler, plaintiff’s argument succeeds.
 17 See *Lingenfelter*, 504 F.3d at 1040–41 (holding ALJ’s RFC assessment and step five
 18 determination were not supported by substantial evidence where the RFC and
 19 hypotheticals to vocational expert failed to include all the claimant’s impairments).

20 **E. Remand with Instructions for Further Proceedings**

21 Plaintiff asks the Court to remand this matter for further administrative
 22 proceedings. Pl. Op. Br. at 19. “The decision whether to remand a case for additional
 23 evidence, or simply to award benefits[,] is within the discretion of the court.” *Trevizo*,

1 871 F.3d at 682 (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). The
2 Court agrees this is the appropriate remedy.

3 On remand, the ALJ shall reevaluate the opinions of Dr. Packer, Dr. Bowes, and
4 Dr. Wheeler. The ALJ shall reassess plaintiff's RFC, and reevaluate step five of the
5 disability evaluation process. The ALJ shall conduct all further proceedings necessary to
6 reevaluate the disability determination in light of this opinion.

7
8 III. CONCLUSION

9 Based on the foregoing discussion, the Court finds the ALJ erred when she
10 determined plaintiff to be not disabled. Defendant's decision to deny benefits therefore
11 is REVERSED and this matter is REMANDED for further administrative proceedings.

12 Dated this 17th day of July, 2020.

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Theresa L. Fricke
16 United States Magistrate Judge
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